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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-494

GEMEINDE BRAÜ, INC., PAUL A. ZIMMERMAN, EMMA J. ZIMMERMAN and
COLD SPRING BREWING CO.,
Petitioners,

v.

AMANA SOCIETY and AMANA REFRIGERATION, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals
for the Eighth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION
and
MOTION UNDER RULE 56(4)

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OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Iowa, Cedar Rapids Division, is reported at 417 F.Supp. 310 (N.D. Iowa 1976), and the opinion of the United States Court of Appeals for the Eighth Circuit is reported at 557 F.2d 638 (8th Cir. 1977).

JURISDICTION

Jurisdiction of the Supreme Court of the United States in this matter arises under 15 U.S.C. Section 1122 and 28 U.S.C. Section 1254(1), not under 15 U.S.C. Section 1 as petitioners assert.

STATUTES INVOLVED

Respondents deny that either statute, 15 U.S.C. 1 or 15 U.S.C. 1115(b)(7), cited by petitioners is properly involved in this matter. Instead, to the extent any statutes are properly involved in connection with the Petition, the most important are 15 U.S.C. Sections 1114(1), 1116 and 1117, the pertinent portions of which provide:

15 U.S.C. 1114(1)

Any person who shall, without the consent of the registrant—

(a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; . . . shall be liable in a civil action by the registrant for the remedies hereinafter provided. . . .

15 U.S.C. 1116

The several courts vested with jurisdiction of civil actions arising under this chapter shall have power to grant injunctions, according to the principles of equity and upon such terms as the court may deem reasonable, to prevent the violation of any right of the registrant of a mark registered in the Patent and Trademark Office. . . .

15 U.S.C. 1117

When a violation of any right of the registrant of a mark registered in the Patent and Trademark Office shall have been established in any civil action arising under this Chapter, the plaintiff shall be entitled, subject to the provisions of sections 1111 and 1114 of this title, and subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. . . . The court in exceptional cases may award reasonable attorney fees to the prevailing party.

QUESTIONS PRESENTED

Respondents deny that the "Questions Presented" in this matter are as stated by petitioners. Rather, respondents assert that the following is the single, proper question presented.

Whether, especially in view of the Court of Appeals' *per curiam* affirmation of the District Court's findings of fact and conclusions of law, the Petition, particularly in the light of this Court's Rule 19, presents any aspect of the matter which warrants issue of a Writ of Certiorari.

STATEMENT OF THE CASE

A. Proceedings in the District Court.

These actions were begun by respondents by the filing of separate Complaints on December 31, 1975 charging petitioners Gemeinde Braii Inc., Paul A. Zimmerman and Emma J. Zimmerman with Federal statutory trademark infringement, common law unfair competition and State statutory trademark infringement and requesting a Preliminary Injunction. A hearing was held on January 8, 1976, at which both actions were con-

solidated and resulted in the grant of a Preliminary Injunction against the foregoing three petitioners on January 9, 1976.

After discovery proceedings, each respondent filed a Motion for Leave to File an Amended and Substituted Complaint adding petitioner Cold Spring Brewing Co. as a defendant, accompanied by an Application for a Temporary Restraining Order and Preliminary Injunction against it. Both Motions and Applications were granted. The Amended and Substituted Complaints, in addition to counts charging all petitioners with Federal statutory trademark infringement, common law unfair competition and State statutory trademark infringement, also added counts charging Federal statutory unfair competition and, in the Complaint of respondent Amana Society, a count was added to enjoin an attempt by petitioners Gemeinde Braü, Inc., Paul A. Zimmerman and Emma J. Zimmerman to procure a false trademark registration from the United States Patent and Trademark Office.

A trial on the merits was held March 10, 1976 and resulted in the Judgment of the District Court of July 13, 1976 from which petitioners appealed to the Court of Appeals for the Eighth Circuit and respondent Amana Refrigeration, Inc. cross-appealed. Following subsequent proceedings in accordance with the July 13, 1976 Judgment, a supplemental Judgment of September 24, 1976 was entered fixing the amounts of petitioners' profits and respondent Amana Society's attorneys' fees to be paid by petitioners on account of the amount of which fees respondent Amana Society cross-appealed.

B. Proceedings in the Court of Appeals.

The consolidated appeals and cross appeals were argued before the Court of Appeals on June 15, 1977 and on July 6, 1977 that Court, in a *per curiam* decision, affirmed the judgment of

the District Court in its entirety, stating that "Upon a review of the record and of the briefs and arguments of the parties, we are convinced that the trial court's findings of fact are not clearly erroneous and it applied the correct legal principles to the factual issues presented." 557 F.2d at 639.

CONDENSED STATEMENT OF FACTS

Respondent Amana Society was incorporated in Iowa in about 1854 as a sort of communal settlement. The Society owns agricultural lands within which are seven unincorporated villages, including the village of "Amana". Amana Society owned enterprises manufacture woolens, furniture, meats, bread and other products, all within the corporate or territorial limits of the Society. These manufactured articles are and have been for many years sold under the name AMANA, some on a nationwide basis. The Amana Society owns three incontestable Federal Registrations of AMANA as a trademark for a variety of goods including bread, meats, furniture and woolens. These Registrations recite dates of first use of AMANA as a trademark on the goods concerned as far back as 1932.

Respondent Amana Refrigeration, Inc.'s predecessor corporation purchased in 1950 the assets of the refrigeration business previously conducted by respondent Amana Society. Included was the goodwill, especially the ownership of the trademark AMANA with respect to certain refrigeration products. It currently manufactures various appliances such as air conditioners, freezers, refrigerators, microwave ovens and furnaces. These it sells under the trademark AMANA in all 50 states of the United States and throughout the world. Amana Refrigeration also owns three incontestable Federal Trademark Registrations of AMANA for refrigerators, freezers, air conditioners and the like with dates of first use going back to 1945.

Petitioner Gemeinde Braü, Inc. was formed as an Iowa corporation in 1971 whose principal office is located near South Amana, another of the Amana Society villages. Its only officers and directors are petitioners Paul A. Zimmerman and his wife Emma J. Zimmerman. Gemeinde Braü, Inc.'s business is the wholesaling of beer. Previous to the events giving rise to these actions, Gemeinde Braü, Inc. sold and still is selling beer under the name GEMEINDE BRAÜ. The beer itself, on the other hand, is produced for Gemeinde Braü, Inc. and to its specifications by petitioner Cold Spring Brewing Co. of Cold Spring, Minnesota.

Suddenly on December 29, 1975, without the consent or knowledge of either respondent, Gemeinde Braü, Inc. began to market another beer under the name AMANA BEER. *It did so despite the fact that several years previously Mr. Zimmerman had requested permission of the Amana Society to market beer under the AMANA name and had been refused.* AMANA BEER was brewed by petitioner Cold Spring Brewing Co. to the specifications of petitioners Mr. and Mrs. Zimmerman. AMANA BEER was sold to retail stores in and about the Amana villages and in other cities, in many of which respondent Amana Society's bread and meats are also sold under its mark AMANA. The marketing of AMANA BEER resulted in the filing on December 31, 1975 of the present actions by respondents.

ARGUMENT

A. The Petition Contains Fundamental Errors as to the Scope of Review in This Court and Basic Misconceptions as to Trademark Law.

Three of the four questions which petitioners assert are presented for review are (1) whether respondents are "jointly owners" of the trademark AMANA for beer in connection with which neither respondent has used the mark and for which neither has registered it; (2) whether petitioners' use of "AMANA BEER, Amana, Iowa," is a geographical use of AMANA or an infringement of respondents' registered mark AMANA; and (3) whether respondent Amana Society was properly awarded attorney fees under the circumstances.

In the first place, petitioners are, in effect, asking this Court to countermand the District Court's findings of fact. That Court found that respondents were each the owners of the mark AMANA for certain goods, the Amana Society for "bread, buns, cakes, rolls, hams, bacon, sausage" and other goods, and Amana Refrigeration, Inc. for "refrigerators, freezers, and parts thereof" and other appliances. It further found that the sale of AMANA BEER by petitioners was likely to cause the public to believe that beer is sold, sponsored by or otherwise connected with respondents. The District Court therefore concluded as a matter of law, pursuant to 15 U.S.C. Section 1114(1), that petitioners' use of AMANA BEER thereby infringed the trademark AMANA owned by each respondent and that petitioners should thus be enjoined pursuant to 15 U.S.C. Section 1116. The District Court also concluded that petitioners' deliberate use of AMANA for beer after having been denied permission by respondent the Amana Society entitled the latter to an award of reasonable attorney fees, this being an "exceptional case" within 15 U.S.C. Section 1117. The Court of Appeals, in

turn, affirmed the judgment of the District Court in its entirety, stating, as noted above, that the District Court's findings of fact were not clearly erroneous and that it applied the correct legal principles. As to the award of attorney fees to respondent the Amana Society, the Court of Appeals said the District Court acted "within the proper range of its discretion" (557 F.2d at 639).

Nothing in the Petition demonstrates that any of the District Court's findings in the foregoing regards were "clearly erroneous" as required by Rule 52a, Federal Rules of Civil Procedure, in order for this Court to overturn them. Hence, under these circumstances for petitioners to say in effect that the District Court's findings of fact in these regards are questions presented for review is wholly and fundamentally incorrect.

In the second place, and equally important, is the fact that the foregoing three questions asserted for review by petitioners, especially when taken together with the statements on pages 5-8 of their Petition,* also reflect certain basic *misconceptions* of established trademark law which have permeated this matter from its very beginning. The most important of these misconceptions are: (1) that respondents' rights under their trademark AMANA cannot extend to beer because neither has used, or could use, or has registered that mark for beer; (2) that a geographical term, such as "Amana", cannot also function in appropriate instances as a trademark; (3) that it reflects upon the integrity of a trademark that some purchasers of goods bearing that mark may not know the actual source of those

* Although the statements on pages 5-8 of the Petition include a few of the District Court's findings, many of these statements refer to evidence introduced by petitioners which is irrelevant as well as misleading. For instance, petitioners in paragraph h on page 6 state that there was "no evidence of confusion in the marketplace" whereas the District Court in footnote 3 to its findings of fact referred to testimony that there were in fact instances of *actual* confusion.

goods; and (4) that there was no infringement because there was no evidence of *actual* confusion (despite evidence to contrary referred to in the foregoing footnote). The long settled law, however, is clearly contrary to petitioners' views, *and it is noteworthy and significant that petitioners cite no decisions supporting those views.*

(1) The fact that respondents have never used or registered their mark AMANA for beer is irrelevant because the rights of a trademark owner are *not* limited to the precise goods upon which he uses the mark or for which it may be registered. Rather, he may enforce his mark and registration against other goods *upon which use of the mark would be likely to cause confusion or mistake or deception* under the statute, 15 U.S.C. Section 1114(1). *Pure Foods, Inc. v. Minute Maid Corp.*, 214 F.2d 792 (5th Cir. 1954), *cert. den.*, 348 U.S. 888, 75 S.Ct. 208, 99 L.Ed. 697 (1954). Petitioners continue to confuse the rights given by a Federal trademark registration *as to the goods named in the registration* with the right to *enforce* that registration as to goods *not* named in the registration. *Johnson & Johnson v. Diaz*, 339 F.Supp. 60 (C.D. Cal. 1971). Nor is it a defense that the trademark owner might not be able legally to manufacture the accused goods (e.g., beer). *Vickers, Inc. v. Fallon*, 48 F.Supp. 221 (E.D. Mich. 1943) (no defense that sale of defendant's goods bearing infringing mark does not come within plaintiff's corporate charter); *Atlas Diesel Engine Corp. v. Atlas Diesel School*, 60 F.Supp. 429 (E.D. Mo. 1945) (no defense that plaintiff not chartered to do business in defendants' state).

(2) The fact that "Amana" may also be a geographical term does not prevent it in appropriate circumstances from also functioning as a trademark. As this Court held in *Baglin v. Cusenier Co.*, 221 U.S. 580, 31 S.Ct. 669, 55 L.Ed. 863 (1911), the fact that the primary meaning of the word "Chartreuse" was geographical, being the name of locality and of a

monastery in France, did not prevent the acquisition of the exclusive right to use it as the designation of a liqueur made by the monks of the monastery of La Grande Chartreuse. That is to say, as Courts have consistently held, when a geographical term is used in an *arbitrary* sense or has acquired a *secondary meaning*, it may be the subject of a valid trademark. *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 36 S.Ct. 269, 60 L.Ed. 629 (1916) ("The American Girl"); *McIlhenny Co. v. Gaidry*, 253 Fed. 613 (5th Cir. 1918) ("Tabasco Sause"); cf. *Armstrong Paint and Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 59 S.Ct. 191, 83 L.Ed. 195 (1938) (words which are primarily descriptive in a general context may acquire a secondary meaning in a particular context and function as a trademark). In the present matter the District Court concluded that as to *each* respondent AMANA has in fact acquired a secondary meaning and functions as a trademark.

(3) Even though the public or purchasers do not know who the actual manufacturer of the goods concerned is does not affect the validity or function of a trademark. *Saalfield Publishing Co. v. G. & C. Merriam Co.*, 238 Fed. 1 (6th Cir. 1917), *cert. den.*, 243 U.S. 651, 37 S.Ct. 478, 61 L.Ed. 947 (1917). Well recognized examples of this are products sold under "private labels" or "private brands".

(4) It is clear from the statute, 15 U.S.C. Section 1114(1), and the cases that there need not be actual confusion, but only *likelihood* of confusion, in order for there to be trademark infringement. *David Sherman Corp v. Heublein, Inc.*, 223 F. Supp. 430 (E.D. Mo. 1963), *aff'd*, 340 F.2d 377 (8th Cir. 1965).

The foregoing principles of trademark law were those applied or considered by the District Court, and there is absolutely *nothing* in the Petition, particularly in the light of the

District Court's findings, by way of fact, law or argument, that impugns the correctness of the District Court's conclusions of law or the Court of Appeal's approval of them.

B. The Petition on Its Face Presents No "Anti-Trust Violation" for Review by This Court.

The remaining question asserted by petitioners as presented for review involves an alleged "anti-trust violation" by respondent the Amana Society, the purported basis being the letter (petitioners' Exhibit D-11) set forth on page 3 of the Petition. Petitioners assert it constituted a violation of Section 1 of the Sherman Act, 15 U.S.C. 1. But it did not for several reasons, *and here again it is noteworthy and significant that petitioners cite no decisions supporting their assertion*.

(1) In the first place, Section 1 of the Sherman Act by its very words and as judicially interpreted requires some "contract", "combination" or "conspiracy", *Six Twenty-Nine Productions, Inc. v. Rollin Telecasting, Inc.*, 365 F.2d 478 (7th Cir. 1966), some joint action, *House of Materials, Inc. v. Simplicity Patterns Co.*, 298 F.2d 867 (2d Cir. 1962), or some commitment to a *common scheme*, *U.S. v. Standard Oil Co.*, 316 F.2d 884 (7th Cir. 1963). Any conspiracy must be the result of some *agreement*, *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 74 S.Ct. 257, 98 L.Ed. 273 (1954); *U.S. v. Kissel*, 218 U.S. 601, 31 S.Ct. 124, 54 L.Ed. 1168 (1910). Exhibit D-11 by itself obviously fulfills none of these requirements. Furthermore, there was no testimony or other facts introduced at the trial, and there is nothing in the Petition itself, which tends to prove or suggest any such "contract", "combination" or "conspiracy" by respondent the Amana Society with respondent Amana Refrigeration, Inc., or with the addressee of Exhibit D-11, or with anyone else. Nor was there any evidence or is there any assertion

that Exhibit D-11 involved or affected interstate commerce, another necessity before Section 1 of the Sherman Act can be invoked. *U.S. v. Oregon State Medical Society*, 343 U.S. 326, 72 S.Ct. 690, 96 L.Ed. 978 (1952).

(2) In the second place, even were Exhibit D-11 the "anti-trust violation" asserted by petitioners, that would not affect respondent Amana Society's rights in its trademark AMANA or the validity or enforcement of its registration of that mark. As the Courts have held, it must be the *trademark itself* which is used in violation of the anti-trust laws before the right to enforce it can be affected, *Forstmann Woolen Co. v. Murray Slices Corp.*, 10 F.R.D. 367 (S.D. N.Y. 1950) (trade boycott and retail price control not involving a trademark would not prevent enforcement of the mark). An example of a situation in which anti-trust violations affected the enforceability of a trademark is found in *Timken Roller Bearing Co. v. U.S.*, 341 U.S. 593, 71 S.Ct. 971, 95 L.Ed. 1199 (1951), involving *licenses* of a trademark in a violative manner. Plainly, the letter of Exhibit D-11 does not assert the trademark AMANA in any way against the addressee of the letter. Petitioners also cite 15 U.S.C. Section 1115(b)(7) as foreclosing respondent Amana Society's right to enforce its registered mark AMANA, but that Section merely affects *incontestability* of the registration, that is to say, its *evidentiary* advantages, not its validity or enforcement. *Cott Beverage Corp. v. Canada Dry Ginger Ale, Inc.*, 146 F.Supp. 300 (S.D. N.Y. 1956), *appeal dismissed*, 243 F.2d 795 (2d Cir. 1957). In any event, petitioners are foreclosed from attacking the validity of respondent the Amana Society's trademark registrations because they have *admitted* their incontestability in Paragraph I (7) of "Defendants' Answer to Plaintiffs' Amended and Substituted Complaints in Consolidated Action".

(3) In the third place, while the alleged "anti-trust violation" was not raised in any of the pleadings, yet the letter in-

volved, Exhibit D-11, was referred to in testimony at the trial. There, it was brought out, Exhibit D-11 was written but a few days after the infringing AMANA BEER first appeared on the market and reflected the anger and dismay of the Amana Society officials. The land referred to in Exhibit D-11 was leased to the Oktoberfest Committee by respondent the Amana Society at a nominal rental (to cover taxes) in order for the Committee to conduct annual promotional activities on behalf of others including the Amana Society. Furthermore, the "issue" was discussed in the briefs before the District Court, in petitioners' briefs before the Court of Appeals, and in oral argument before the latter Court. Hence, it is both misleading and incorrect for petitioners to imply, in effect, to this Court on pages 3-4 and 8 of their Petition that the matter was overlooked or to state that petitioners did not have their "day in Court" with respect to the "issue". Actually, the probable reason the matter was not mentioned in the opinions of either Court is that both regarded it as too unsubstantial even to warrant comment. After all, petitioners introduced *absolutely no testimony or evidence* that Exhibit D-11 in fact affected the actions of the Oktoberfest Committee, or in fact resulted in that Committee refusing to sell petitioners' products, or in fact resulted in any damage at all to petitioners. Under these circumstances it is little wonder that both Courts thought the matter too unsequential even to mention.

C. Under This Court's Rule 19 There Is Nothing in the Petition Warranting Grant of the Writ.

Finally, there is *absolutely no showing in the Petition*, under the criteria set forth in this Court's Rule 19, that the decision of the Court of Appeals (or that of the District Court) in this matter is in conflict with the decision of any other Court of Appeals, or has decided an important question of federal law which has not been but should be settled by this Court or decided a federal question in a manner conflicting with decisions

of this Court, or has so far departed from accepted and usual judicial proceedings, or sanctioned such a departure, as to call for this Court's supervision. The entire matter has been a routine, if interesting, trademark case in which well established and acknowledged rules of trademark law have been, as the Court of Appeals declared, properly applied to facts found by the District Court which were not clearly erroneous.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit should be denied.

MOTION FOR AWARD OF DAMAGES FOR DELAY CAUSED BY PETITION FOR CERTIORARI

Respondents, in addition to urging denial of the foregoing Petition for Writ of Certiorari, also move the Court for an award of damages pursuant to Rule 56(4) of the Rules of this Court, if the foregoing Petition be denied, upon the ground that it is manifest that there was no ground in Petitioners' Brief for granting the Writ. Such damages, Respondents suggest, should at least reasonably compensate Respondents for the costs of preparation and printing of this Brief.

Respectfully submitted,

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